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ATTORNEYS FOR APPELLANTS:

DANIEL H. PFEIFER
DOUGLAS E. SAKAGUCHI
Pfeifer Morgan & Stesiak
South Bend, Indiana

ATTORNEY FOR APPELLEE
JOSHUA CUMMINGS:

CAROLYN M. TRIER
Trier Law Office
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE
TAMMY HARLAN:

COLIN J. REILLY
BRIAN M. KUBICKI
Jones Obenchain, LLP
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

PATRICIA SKIBINS and RONALD SKIBINS)
as Co-Personal Representatives of the Estate of)
KENNETH SKIBINS,)

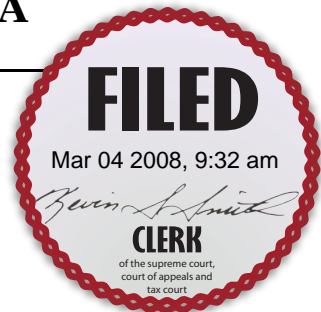
Appellants-Plaintiffs,)

vs.)

JOSHUA CUMMINGS and TAMMY HARLAN,)

Appellees-Defendants.)

No. 46A04-0711-CV-623



APPEAL FROM THE LAPORTE SUPERIOR COURT

The Honorable Paul J. Baldoni, Judge
Cause No. 46D03-0605-CT-139

March 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Patricia Skibins and Ronald Skibins, as co-personal representatives of the Estate of Kenneth Skibins (“Skibins”) (collectively, “the Estate”), appeal the trial court’s entry of summary judgment for Joshua Cummings on the Estate’s wrongful death claim and for Tammy Harlan on the Estate’s negligent entrustment claim. We reverse and remand.

Issue

Does a genuine issue of material fact exist regarding whether Skibins was driving Harlan’s truck at the time of the accident that claimed his life?

Facts and Procedural History

The facts most favorable to the Estate as the non-moving party indicate that on November 20, 2005, Skibins, Cummings, and Harlan were at the Nowhere Bar and Grill in Rolling Prairie, Indiana. Harlan had driven her new truck to the bar that evening. Harlan knew Cummings but was not acquainted with Skibins. Another patron of the bar, Jamie Derda, spoke with Skibins, who appeared intoxicated. Cummings had also been drinking alcoholic beverages. Derda saw Harlan give a set of keys to Cummings, whose driver’s license was suspended. Minutes later, Cummings and Skibins left the bar. Derda looked out the window and saw Cummings standing on the driver’s side of the truck and Skibins walking around the rear of the truck toward the passenger’s side. The truck went out of the parking lot and down the road. After going around a curve, the truck left the roadway and rolled over, ejecting both Skibins and Cummings. Skibins died as a result of injuries sustained in the accident.

On May 4, 2006, the Estate filed a two-count complaint against Cummings and Harlan. Count I alleged that Cummings wrongfully caused Skibins's death by "operating a motor vehicle in a dangerous manner causing it to leave the roadway, roll over and eject both occupants, ultimately causing the death of Kenneth Skibins." Appellants' App. at 2. Count II alleged that Harlan had "negligently entrusted her vehicle to someone [i.e., Cummings] she knew, or in the course of exercise of due care should have known was intoxicated and in no condition to safely operate a motor vehicle." *Id.*

On October 18, 2006, Cummings filed a motion for summary judgment asserting that "Kenneth Skibins was operating the vehicle on the night in question, not Joshua Cummings. There is no claim against Joshua Cummings as a passenger. Therefore, the undisputed evidence demonstrates that [Cummings] is entitled to judgment as a matter of law." *Id.* at 12-13. In support of his motion, Cummings designated portions of Harlan's deposition, in which she stated that Skibins asked her several times if he could drive her truck. She stated that she eventually relented on the condition that Skibins not let Cummings drive the truck because his license was suspended. According to Harlan, Skibins then took the keys and left the bar with Cummings. Cummings also designated portions of his own deposition, in which he stated that Skibins was driving the truck at the time of the accident. Additionally, Cummings designated a copy of the police accident report, which lists Skibins as the driver of the truck.¹

On January 16, 2007, the Estate filed an opposing memorandum asserting that "conflicting inferences and credibility issues" existed regarding whether Skibins or

¹ The police report does not state the basis for this determination.

Cummings was the driver of Harlan's truck. *Id.* at 48. In support thereof, the Estate designated Derda's affidavit, which reads in relevant part as follows:

4. Before the accident, I spoke with Kenneth Skibins for approximately thirty (30) minutes, during which time Kenneth appeared extremely drunk and had severely slurred speech.

5. During my conversation with Kenneth Skibins, Kenneth stated that he was stupid for drinking so much and that someone was driving his vehicle because he was too drunk to drive.

6. During my conversation with Kenneth Skibins, Kenneth was also talking about how nice the stereo system was in Tammy Harlan's new truck and that Joshua Cummings was trying to get Tammy Harlan's keys from Tammy Harlan so they could take a drive in Tammy's new truck.

7. Minutes before Joshua Cummings and Kenneth Skibins left the bar just prior to the accident, I saw Tammy Harlan give Joshua Cummings a set of keys.

8. After Joshua Cummings and Kenneth Skibins left the bar, I looked out the window and saw Joshua Cummings standing on the driver's side of the truck and Kenneth Skibins behind the rear of the truck walking toward the passenger side.

9. After Joshua Cummings and Kenneth Skibins left the bar, the people who were still in Nowhere Bar, including me, learned that Joshua and Kenneth had been involved in an accident.

10. After hearing about the accident, Tammy Harlan told me that Joshua just wanted to drive around the lake and listen to the stereo.

11. After hearing about the accident, I asked Tammy Harlan why she gave Joshua the keys to her truck and she responded by saying "he means so much to me" and "he just wanted to drive around the lake once."

12. I was not drinking alcohol on the evening of November 20, 2005.

Id. at 55-56.

The Estate also designated portions of Harlan's deposition, in which she acknowledged that she "wouldn't allow a stranger who had been drinking to use [her] vehicle" and that Skibins had been a "total stranger" to her until that evening. *Id.* at 51-52. Additionally, the Estate designated a copy of Skibins's toxicology report, which indicates a blood-alcohol level of 322 milligrams per deciliter (mg/dL) and contains the following chart:

20-100 mg/dL-May exhibit slight alcoholic influence
100-200 mg/dL-Incoordination; decreased response to stimuli
200-300 mg/dL-Staggering gait; slurred speech; delirium
250-400 mg/dL-Severe incoordination; unconsciousness
350-500 mg/dL-May be comatose

Id. at 54.

On January 31, 2007, Cummings filed a motion to strike the paragraphs in the Estate's memorandum relating to the toxicology report on the basis that they were unsupported by expert testimony.² Cummings also moved to strike the paragraphs in the Estate's memorandum relating to paragraphs 5, 6, 10, and 11 of Derda's affidavit, as well as those paragraphs in the actual affidavit, on hearsay grounds.

On July 18, 2007, the Estate filed an opposing memorandum designating the affidavit of a toxicologist who reviewed the toxicology report. On July 26, 2007, Cummings filed a reply asking the court to disregard the toxicologist's affidavit on the basis that it was improperly designated and lacked a proper foundation. The trial court never ruled on Cummings's motion to strike.

On August 31, 2007, Harlan filed a motion to join in Cummings's summary judgment motion, asserting that the undisputed evidence showed that Skibins was driving the truck and therefore the Estate's negligent entrustment claim must fail.³ On that date, the trial court held a hearing on the summary judgment motions. On September 14, 2007, the trial court issued an order that reads in pertinent part as follows:

² Curiously, Cummings did not move to strike the toxicology report itself.

³ As far as we know, the Estate has not amended its complaint to allege in the alternative that Harlan was negligent in entrusting her vehicle to Skibins.

On November 20, 2005, Kenneth Skibins and Joshua Cummin[g]s were occupants of a pick-up truck owned by Tammy Harlan. That truck crashed and Kenneth Skibins died as a result of his injuries. The defendants, Joshua Cummin[g]s and Tammy Harlan, assert that at the time of the accident, Kenneth Skibins was the driver of the Harlan pick-up truck, not Joshua Cummin[g]s.

The Court finds that there is no material issue of fact and that the defendants, Joshua Cummin[g]s and Tammy Harlan, are entitled to summary judgment.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Summary Judgment of the defendants Joshua Cummin[g]s and Tammy Harlan is now granted.

Id. at 130. The Estate now appeals.

Discussion and Decision

Our standard of review in such cases is well settled:

The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. Our standard of review is the same as that of the trial court. Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Swift v. Speedway Superamerica, LLC, 861 N.E.2d 1212, 1213-14 (Ind. Ct. App. 2007)

(citations omitted), *trans. denied*.

Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial. A factual issue is material for the purposes of Trial Rule 56(C) if it bears on the ultimate resolution of a relevant issue.

Bd. of Sch. Comm'rs of Indpls. v. Pettigrew, 851 N.E.2d 326, 330 (Ind. Ct. App. 2006).

(citation omitted), *trans. denied*.

Our review of a summary judgment motion is limited to those materials designated to the trial court. *Id.* “All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party.” *Swift*, 861 N.E.2d at 1214. “Neither the trial court nor this court may weigh evidence or make credibility determinations when reviewing a summary judgment motion. If material facts conflict, or undisputed facts lead to conflicting inferences, summary judgment should not be granted, even if it appears the plaintiff will not succeed at trial.” *Wilson v. Royal Motor Sales, Inc.*, 812 N.E.2d 133, 135 (Ind. Ct. App. 2004) (citation omitted). “A trial court’s reasoning for entering summary judgment, although unnecessary, is helpful to the litigants and aids our review.” *Haskell v. Peterson Pontiac GMC Trucks*, 609 N.E.2d 1160, 1163 (Ind. Ct. App. 1993). We are not bound by the trial court’s findings, however. *Id.* “We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court’s ruling was improper.” *Reel v. Clarian Health Partners, Inc.*, 873 N.E.2d 75, 78 (Ind. Ct. App. 2007) (citation omitted), *trans. denied* (2008).

We conclude that the Estate has met its burden here. In support of his summary judgment motion, Cummings designated evidence, including portions of his own deposition, to establish that Skibins was driving Harlan’s truck at the time of the accident. In response, the Estate designated contradictory evidentiary materials, the most relevant of which are paragraphs 7 and 8 of Derda’s affidavit, which we again recite in full:

7. Minutes before Joshua Cummings and Kenneth Skibins left the bar just prior to the accident, I saw Tammy Harlan give Joshua Cummings a set of keys.

8. After Joshua Cummings and Kenneth Skibins left the bar, I looked out the window and saw Joshua Cummings standing on the driver's side of the truck and Kenneth Skibins behind the rear of the truck walking toward the passenger side.

Appellants' App. at 56.

These paragraphs—which Cummings did not move to strike and are based on Derda's personal knowledge—raise a reasonable inference that Cummings was driving the truck at the time of the accident. Such an inference, which we must construe in the Estate's favor, is sufficient to create a genuine issue of material fact regarding the identity of the driver of the truck that precludes granting summary judgment in favor of Cummings and Harlan. The designated evidence indicates that no third party actually saw which man was driving Harlan's truck at the time of the accident. In light of Derda's affidavit, Cummings's designated evidence is insufficient to establish as a matter of law that Skibins drove the truck. A finder of fact must weigh the conflicting evidence and judge the witnesses' credibility to determine whether Skibins or Cummings was the driver of Harlan's truck. Therefore, we reverse and remand for further proceedings consistent with this opinion.⁴

Reversed and remanded.

BAILEY, J., and NAJAM, J., concur.

⁴ Because we conclude that paragraphs 7 and 8 of Derda's affidavit are sufficient to preclude summary judgment, we need not address the parties' arguments regarding the admissibility of the hearsay statements in the affidavit or the toxicology-related evidence.